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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-207068.3 DATE: Dec. 21, 1982

MATTER OF: Martin Manufacturing Co., Inc.--
Reconsideration

DIGEST:

1. Prior decision is affirmed where the awardee fails to show that it contained any error of fact or law.

2. Under prior decision, GAO did not usurp the Department of Labor's (DOL) statutory authority to designate labor surplus areas (LSA), but only held that, under the particular circumstances presented, the protester's place of performance could be considered an LSA at the time of bid opening even though the effective date for it being added to DOL's current LSA list was 2 days after bid opening.

3. In view of the several additional factors present here, this case is not appropriate for a strict application of the general rule that, to be eligible for an LSA preference, a bidder's proposed place of performance must be on the current LSA list at the time of bid opening. Thus, contrary to the awardee's assertion, GAO has not contradicted its earlier LSA decisions nor will the prior decision cause administrative confusion among Government procurement officials or erode the integrity of the competitive procurement process.

4. GAO will not reverse its recommendation for corrective action since, despite the awardee's belief, GAO did not expound a new rule under the prior decision nor has the contracting agency indicated that termination of the contract would result in extensive termination costs or damaging delays in the completion of the work.

Gulf Apparel Corporation (Gulf) requests reconsideration of our decision in the matter of Martin Manufacturing Co., Inc., B-207068.2, September 27, 1982, 82-2 CPD 281, in which we concluded that Martin Manufacturing Co., Inc. (Martin), was entitled to a labor surplus area (LSA) preference in the evaluation of the bids received under invitation for bids (IFB) No. DLA100-82-B-0445, issued by the Defense Logistics Agency (DLA) Defense Personnel Support Center, Philadelphia, Pennsylvania.

We affirm our prior decision.

The pertinent facts are as follows:

"The IFB solicited bids for 770,328 men's short sleeve shirts. Paragraph K17, entitled 'ELIGIBILITY FOR PREFERENCE AS A LABOR SURPLUS CONCERN,' notified bidders that LSA concerns would receive a preference under this procurement and requested information on the location or locations of the labor surplus area 'where costs incurred on account of manufacturing or production (by offeror or first tier subcontractor) will amount to more than fifty percent (50%) of the contract price.' Paragraph LD5, entitled 'NOTICE OF TOTAL SMALL BUSINESS AND LSA SMALL BUSINESS CONCERN SET-ASIDE WITH PRICE DIFFERENTIAL,' informed bidders that only small business concerns could participate in the procurement and that, for purposes of evaluation, a factor of 5 percent would be added to the bids of small businesses which were not LSA concerns.

"In its bid, Martin indicated that its place of performance would be Weakley County, Tennessee. As of the date the IFB was issued, Weakley County had not been included on the list of LSA's published by the Department of Labor. However, the area had experienced a substantial surge in unemployment and this situation was brought to the attention of the Secretary of Labor. The Secretary conducted an inquiry and concluded that, under provisions of 20 C.F.R. § 654.5(c) (1981), 'exceptional circumstances' existed which justified inclusion of Weakley County on the LSA list.

"In a March 12, 1982, letter to two members of Congress, the Secretary stated:

"'[W]e will include Weakley County in the next update to the annual listing of Labor surplus areas. This update will be effective April 1.'

"By letter of March 27, 1982, Martin informed the contracting officer of this development and further stated that its bid could now be considered to comply with the solicitation's LSA provisions--paragraphs K-17 and LD5.

"Bids were opened on March 30, 1982. On that same day, the notice of Weakley County's addition to the LSA list was published in the Federal Register. See 47 Fed. Reg. 13432, March 30, 1982. This notice stated that Weakley County and certain other specified locations 'are classified' labor surplus areas and 'are added to the annual list of labor-surplus areas, effective April 1, 1982.' The notice further indicated that it had been signed by the Assistant Secretary of Labor on March 18, 1982.

"After examining the bids, DLA concluded that Martin could not be considered an LSA concern for purposes of this procurement because Weakley County had not been included on the LSA list actually in effect at the time of bid opening. Consequently, DLA added the 5-percent evaluation factor to Martin's bid and this effectively removed Martin from the competition. The award was ultimately made to Gulf Apparel Corporation, an LSA concern."

In Martin, we held that, under the particular circumstances presented, Martin's proposed place of performance was tantamount to having been on the current LSA list at the time of bid opening and that Martin therefore was entitled to the LSA preference. In reaching this conclusion, we distinguished Martin's situation from those presented in S.G. Enterprises, Inc., B-205068, April 6, 1982, 82-1 CPD 317, and Vi Mil Inc., B-207603, June 23, 1982, 82-1 CPD 621, affirmed, Vi Mil Inc.-Reconsideration, B-207603.2, July 30, 1982, 82-2 CPD 96, where we had held that, as a

general rule, to be eligible for the LSA preference, a bidder's proposed place of performance had to be identified as an LSA on the published list which was current as of the date of bid opening.

On reconsideration, Gulf argues that our Office is usurping the statutory authority of the Department of Labor (DOL) to determine when a particular locality is an LSA since in Martin we declared Weakley County an LSA as of March 30, 1982, even though the DOL notice in the Federal Register specifically stated that Weakley County was added to the LSA list effective April 1, 1982. In addition, Gulf argues that our holding in Martin not only contradicts our prior decisions, but also is certain to cause administrative confusion for Government procurement officials, as well as erode the integrity of the procurement process. DLA joins Gulf in this argument. Finally, Gulf maintains that, if we decide to affirm our prior decision, we should nevertheless modify our recommendation that the contract to Gulf be terminated to the extent necessary to award to Martin all, or as much as possible, of the amount it otherwise would have received had it been given the LSA preference at the outset. Instead, we should provide that our holding in Martin is prospective only. In Gulf's opinion, our recommendation is unnecessarily harsh, causing both a hardship on Gulf and added costs for the Government.

As to Gulf's first argument regarding DOL's statutory authority to designate LSA's and the time such designations become effective, we disagree that our decision in any way usurps DOL's authority. The notice published in the Federal Register on March 30, 1982, states that the areas listed, including Weakley County, "have been classified" labor surplus areas, thus indicating that Weakley County was already considered an LSA prior to the March 30 notice. The notice further states that the named localities "are added to the annual list of labor surplus areas, effective April 1, 1982." In our opinion, the effective date under these circumstances merely designates a time for an administrative action to take place--the updating of the LSA list. This action had no impact on Weakley County's status as a labor surplus area.

We also disagree with Gulf's contention that Martin not only contradicts our prior decisions, but will cause administrative confusion, as well as erode the integrity of the competitive procurement process. As we explained in Martin, that case can be distinquished from both S.G. Enterprises and Vi Mil. In both of those decisions, the designated place of performance was not only a non-LSA at the time of

bid opening, but also the information that those locations would soon become labor surplus areas was unknown except to the protesters who had somehow learned of this development through informal channels. In Martin's case, however, the Secretary of Labor publicly announced the change in Weakley County's LSA status in a letter to two Members of Congress dated more than 2 weeks before the bid opening date; this information was conveyed to DLA prior to bid opening; and, finally, a public notice of Weakley County's addition to the LSA list was published in the Federal Register on the day of bid opening. When taken in their totality, these circumstances clearly distinquish Martin from S. G. Enterprises and Vi Mil. The danger that the bidder would be able to manipulate its competitive position after bid opening by either electing to perform in the area listed in its bid or some non-LSA location is not present in Martin. As noted in our prior decision, the factors present in Martin are such that Weakley County was tantamount to having been on the current LSA list at the time of bid opening.

Gulf has emphasized that the only difference between Martin and Vi Mil is that the effective date for Martin's listing on the LSA list was 2 days after bid opening, while Vi Mil's was 14. In Gulf's opinion, Government procurement officials will now have to guess whether an effective date of more than 2 days after bid opening, but less than 14, will qualify a bidder for an LSA preference. However, we believe that we have sufficiently demonstrated that it was a combination of factors which resulted in our conclusion that to deny Martin an LSA preference would be an overly technical application of the general rule established earlier in S. G. Enterprises and in Vi Mil. In our opinion, Gulf places undue emphasis on only one of the several factors on which our prior decision was based. We conclude, therefore, that Gulf has not shown that Martin contradicts our earlier decisions, will cause administrative confusion among Government procurement officials, or will erode the integrity of the competitive procurement process.

Gulf's final argument is that our recommendation for corrective action be reversed and that our holding in Martin be applied prospectively. According to Gulf, our recommendation that its contract be terminated for the convenience of the Government to the extent necessary to award Martin all, or as much as possible, of the amount it otherwise would have received had it been given the LSA preference at the outset will result in Gulf being unfairly deprived of its expected profits, increase DLA's costs, and delay delivery. Citing our decision in Esko & Young, Inc., B-204053, January 14, 1982, 82-1 CPD 5, Gulf argues that the proper

course when GAO has enunciated a new rule and the agency will incur extensive termination costs is to leave the awarded contract undisturbed and instruct the contracting agency to apply the new rule in future procurements.

While we agree with this general rule, we do not find it applicable here. As indicated above, Martin does not contradict our earlier decisions in this area nor does it expound a new rule. Moreover, in Esko & Young, supra, the Veterans Administration advised our Office that, due to the nature of the work involved and the extent of contract performance, termination of the contract would result in extensive termination costs and damaging delays in the completion of the project. DLA, however, has made no such claim here. Finally, whether Gulf will suffer a loss of expected profits is not a basis for modifying our recommendation.

We conclude, therefore, that Gulf has not shown that our decision of September 27, 1982, sustaining the protest of Martin Manufacturing Co., Inc., contained any error of fact or law. In light of this, that decision is affirmed.

for Milton J. Socolar
Comptroller General
of the United States